(1) Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KARL DAVID & JOHN DAVID,

Petitioners

v.

KENNETH G. MOSLEY & TAYLOR BLANTON,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

Whether, for purposes of qualified immunity analysis pursuant to Anderson v. Creighton, 483 U.S. 635 (1987), a right established by statute is "clearly established" where a regulation arguably adds a condition to the exercise of the right not found in the statute.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Karl David, John David, Kenneth G. Mosley, and Taylor V. Blanton. There are no parent companies and non-wholly owned subsidiaries to be listed.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is not reported, but is reproduced in the Appendix. App. 3a. The opinion of the United States District Court is reported at 915 F. Supp. 776 (E.D. Va. 1996) and is reproduced in the Appendix. App. 6a.

JURISDICTION

On November 26, 1996, the Court of Appeals affirmed the judgment of the District Court dismissing Petitioners' complaint. App. 3a. On January 23, 1997, the Court of Appeals denied Petitioners' petition for rehearing with suggestion for rehearing en banc. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES AND REGULATION

18 U.S.C. § 922(n):

It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 925(b):

A licensed dealer . . . who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to

the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

27 C.F.R. § 178.143:

A licensed . . . dealer . . . who is indicted for a crime punishable by imprisonment for a term exceeding 1 year may, notwithstanding any other provision of the Act, continue operations pursuant to his existing license during the term of such indictment and until any conviction pursuant to the indictment becomes final: **Provided,** That if the term of the license expires during the period between the date of the indictment and the date the conviction thereunder becomes final, such . . . dealer . . . must file a timely application for the renewal of his license in order to continue operations. Such application shall show that the applicant is under indictment for a crime punishable by imprisonment for a term exceeding 1 year.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

This case was an action for damages for violations of the Fourth and Fourteenth Amendments pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 91 S.Ct. 1999 (1971) and pursuant to 42 U.S.C. § 1983 as a result of the execution of a search warrant at, and the seizure of property from, the home of Karl David and John David by Special Agent Kenneth G. Mosley of the federal Bureau of Alcohol, Tobacco & Firearms (BATF), three "John Doe" BATF

special agents, Taylor V. Blanton of the Virginia State Police, and two Caroline County sheriff's deputies (Scot Moser and B.J. Cropper).

The action was filed in the district court by Karl David and John David on May 4, 1995.

Count I of the Complaint alleged that the search of the Davids' home was unlawful since it was based upon a warrant that had been issued without probable cause. There was no probable cause because 18 U.S.C. § 925(b) provides an exception to the prohibition of 18 U.S.C. § 922(n) for licensed dealers who timely file a renewal application and Karl David, a licensed dealer, had timely filed a renewal application. Count II alleged that the seizure of 26 firearms was unlawful for the reason stated in Count I. Count III claimed that, even if the search was lawful, the seizure of 6 firearms (of the 26 firearms seized) was unlawful because they were outside the scope of the warrant and, at the time they were seized, there was no independent probable cause to believe that they were acquired after October 6, 1993. Count IV alleged that the seizure of all documents was unlawful for the reason stated in Count I.[1]

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1 Count V, the dismissal of which was not appealed, asserted that the seizure of documents relating to firearms transactions occurring before October 6, 1993 was unlawful since they were outside the scope of the warrant. Count VI, which was dismissed by agreement of the parties, alleged that Caroline County did not properly train its sheriff's deputies. Count VII, the dismissal of which was not appealed, asserted that Blanton unlawfully directed a UPS employee to open a package addressed to Karl's Gun Shop.

The district court granted Mosley's Motion for Summary Judgment as to Counts I, II, and IV on the basis of qualified immunity and on the merits as to Count III. App. 26a, 32a. The district court also granted Blanton's Motion for Summary Judgment as to Counts I, II, and IV on the basis of qualified immunity and on the merits as to Counts III, V, and VII. App. 27a, 32a, 33a.

The court of appeals adopted the district court's reasoning and affirmed the judgment of the district court.

(ii) Facts

Karl David and his son John David reside together in Milford, Virginia. Karl David owned and operated Karl's Gun Shop, a sole proprietorship, from 1990 until September, 1994. During that period, he was a federally licensed firearms dealer. Karl's Gun Shop operated out of the Davids' home since being licensed.

On October 6, 1993, Karl David was indicted by a Caroline County, Virginia grand jury for violating Virginia Code § 18.2-111.[2]

On March 23, 1994, Karl David submitted an ATF Form 8, Renewal of Firearms License, to the BATF to renew his federal firearms license for Karl's Gun Shop, which was due to expire. One of the questions on the form was: "Are you presently under indictment or information in any court for a crime punishable by imprisonment for a term exceeding one year?" He responded "no".

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2 He was acquitted on September 14, 1994.

In April, 1994, Blanton became aware of Karl David's indictment. Later in the month, Blanton also discovered that Karl David was a licensed firearms dealer. Blanton, who was then assigned to work with the BATF and had been deputized as a Special Deputy United States Marshal, informed Mosley, with whom Blanton was then working, of what he had discovered. Mosley believed that, in view of the indictment, Karl David's receipt of firearms after October 6, 1993 was unlawful pursuant to 18 U.S.C. § 922(n). Blanton was thus instructed to request the United Parcel Service (UPS) to notify him if any packages were to be delivered to Karl's Gun Shop.

On April 21, Kenneth Tickle of the UPS opened a package addressed to Karl's Gun Shop from Bob's Gun Shop of Norfolk, Va., in which he discovered a handgun. Tickle notified Blanton, who in turn informed Mosley. The package containing the handgun was delivered to Karl's Gun Shop on April 25.

On April 26, Blanton advised Mosley that UPS had two more packages for Karl's Gun Shop, one of which was determined to contain a firearm. Later that day, Mosley, posing as a UPS employee, delivered the two packages to Karl David.

After Mosley informed the United States Attorney of Karl David's receipt of the firearms, Mosley testified before a grand jury, which indicted Karl David on May 4 for making a false statement in the license renewal application form in violation of 18 U.S.C. § 924(a)(1)(A) and for receipt of firearms in violation of 18 U.S.C. § 922(n). Also on that

day, Mosley submitted an application for a search warrant to U.S. Magistrate Judge David G. Lowe. The application alleged that there were at the premises

> certain . . . documents . . . denoting the purchase, receipt, ordering and shipment of firearms since October 6, 1993, and firearms received . . . since October 6, 1993.

It further alleged that this property related to violations of 18 U.S.C. §§ 922(n) and 924(a)(1)(A). The affidavit also stated that certain records must be kept by a federally licensed firearms dealer. The affidavit concluded by stating:

> It is based upon the above information that your affiant believes probable cause exists to secure a search warrant for the premises known as Karl's Gun Shop, located at Route 1, Box 64 A, in Milford, Virginia, along with it's (sic) outbuildings and appurtenances, in that your affiant believes there exists within this premises, certain documents relating to the making of unlawful false statements on forms required by Federal law and certain documents and firearms relating to the unlawful receipt of firearms on the part of this Federal Firearms Licensee.

At no point in the application or the affidavit did Mosley mention 18 U.S.C. § 925(b), which has been a part of Title 18 since 1968.

Based upon Mosley's affidavit, Magistrate Judge

Lowe issued a search warrant on May 4, 1994 to search the "premises known as Karl's Gun Shop, at Route 1, Box 64 A, Milford, Virginia." The warrant authorized the seizure of documents to include Federal firearms licenses, applications for Federal firearms licenses, firearms acquisition and disposition record books, receipts, bills of sale, invoices, order forms, and other records denoting the purchase, receipt, ordering and shipment of firearms since October 6, 1993, and firearms received and purchased since October 6, 1993.

On May 5, Mosley, the three "John Does," Blanton, Moser, and Cropper searched the Davids' home. In the course of the search, they went through drawers, closets, and trunks throughout the Davids' home. They discovered some 50 firearms throughout the house which were collected in the living room.

After several hours of reviewing invoices and the Acquisition & Disposition Book ("A&D Book") for Karl's Gun Shop to determine when each of the 50 firearms found in the Davids' home was acquired, 26 firearms were seized, along with copies of expired federal firearms licenses for Karl's Gun Shop, a Report of Violations, and three BATF publications.[3]

Of the 26 firearms seized, Mosley had located documentation showing that Karl David had acquired 11 of them after October 6, 1993; from the controlled delivery on April 26, Mosley knew that a twelfth firearm had also been acquired after October 6, 1993. Of the remaining 14 firearms, Mosley could not determine, during the search, the date they had been acquired by Karl David. After the search,

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3 Mosley and Blanton also asked the Davids for information concerning firearms for which no records could be found.

however, Mosley determined that 8 of the 14 firearms had been acquired after October 6, 1993. For the other 6 firearms, the date of receipt could not be determined.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER, FOR PURPOSES OF QUALIFIED IMMUNITY ANALYSIS, A STATUTORY RIGHT IS CLEARLY ESTABLISHED WHERE A REGULATION ARGUABLY ADDS A CONDITION TO THE EXERCISE OF THE RIGHT NOT FOUND IN THE STATUTE

I. THIS COURT'S DECISIONS REGARDING QUALIFIED IMMUNITY

In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), this Court rejected any subjective test for qualified immunity and made clear that government officials have qualified immunity

> insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The most recent case concerning qualified immunity, Anderson v. Creighton, 483 U.S. 635 (1987), affirmed this "clearly established" rights test. Anderson, moreover, did not retreat from the holding that the "clearly established" rights referred to are statutory or constitutional rights. No case from this Court, however, has resolved the question of whether a statutory right is "clearly established" where a regulation purports to limit the application of the statutory right. To resolve this important question, presented directly

by this case, this Court should grant this petition.

II. THE DECISION BELOW

In granting summary judgment as to Counts I, II, and IV, the district court[4] properly held that "the determination of a defense of qualified immunity involves three distinct steps:

> '(1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right.'"

App. 20a.

The district court also correctly concluded that the "specific right allegedly violated is said to be found in an exception to 18 U.S.C. § 922(n) . . . ." Id. The exception referred to is found in 18 U.S.C. § 925(b), which provides that a licensed dealer

> who is indicted for a crime punishable by imprisonment for a term exceeding one year, may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any

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4 All references are to the district court opinion since it was adopted by the court of appeals. App. 5a.

> conviction pursuant to the indictment becomes final. (emphasis added).

In concluding that Mosley and Blanton had qualified immunity, the district court held, however, that, although § 925(b) "itself does not explicitly condition qualification for the exemption upon the filing of a truthful application," App. 23a, "the putative right allegedly violated by Mosley does not exist." Id. The basis for this conclusion was the underscored language of the following regulation:

> A licensed . . . dealer . . . who is indicted for a crime punishable by imprisonment for a term exceeding 1 year may, notwithstanding any other provision of the Act, continue operations pursuant to his existing license during the term of such indictment and until any conviction pursuant to the indictment becomes final: **Provided**, That if the term of the license expires during the period between the date of the indictment and the date the conviction thereunder becomes final, such . . . dealer . . . must file a timely application for the renewal of his license in order to continue operations. Such application shall show that the applicant is under indictment for a crime punishable by imprisonment for a term exceeding 1 year.

27 C.F.R. § 178.143 (emphasis added).[5]

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5 In addition, the district court held that "a logical common sense interpretation of the statute is that the dealer must somehow inform the licensing agency of the fact of the indictment . . . ." App. 23a.

Thus, according to the district court, a licensed firearms dealer does not have "the right to operate under an existing license" if he does not "disclos[e] . . . the fact of indictment." App. 23a.

In short, the district court concluded that, because a regulation imposed a condition on the exercise of a statutory right, the right did not exist and thus was not clearly established.

III. A RIGHT ESTABLISHED BY STATUTE MAY NOT BE LIMITED BY A REGULATION

A. This Court's Decisions

In its opinions concerning qualified immunity, this Court has not explicitly set forth the basis for its consistent holdings that government officials do not have qualified immunity where such officials violate clearly established "statutory or constitutional rights . . . ." Harlow, at 818. See also Anderson, at 639. The basis for focusing on "statutory or constitutional rights" is surely found, however, in the purpose for recognizing qualified immunity.

As stated in Harlow, qualified immunity does not exist to eliminate the liability of government officials since "damages may offer the only realistic avenue" for vindication of rights. 457 U.S. at 814. Rather, qualified immunity is invoked to minimize "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson, at 638. See also Harlow, at 814.

Since the "social costs" of statutory rights are appropriately weighed by Congress in enacting the statutes,

it is evident that this Court viewed liability for violation of statutory rights as not entailing substantial social costs. Indeed, by the very enactment of statutory rights, Congress has determined that the social costs of such rights are outweighed by the need for the exercise of the right.

Moreover, since Congress establishes the duties of federal officials, imposing liability for violations of statutory rights would not inhibit such officials in the discharge of those duties.[6] In fact, allowing officials qualified immunity for violations of statutory rights would be tantamount to the judiciary establishing the duties of such officials.

In light of the reasons qualified immunity has been established by this Court, a regulation may not limit a statutory right.

In the first place, a regulation is a reflection of an agency's view of social cost. Thus, allowing a regulation to limit a statutory right effectively allows an agency to second guess a congressional determination that a particular statutory right does not entail substantial social costs.[7] Second, permitting a regulation to limit a statutory right effectively allows an agency to determine the duties of federal officials in contradiction to the determination made by Congress.

In sum, the reasons which impelled this Court to establish qualified immunity dictate that a regulation cannot, consistent with the purposes of qualified immunity, limit the

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6 Federal officials include state officials, such as Blanton, who have been federally deputized and who are enforcing federal law.

7 Allowing a regulation to limit a statutory right would also encourage agencies to promulgate regulations contrary to statutory rights just to preclude liability.

protection accorded by a statutory right.

B. The Right Created By § 925(b) May Not Be Limited By A Regulation

In the instant case, the statutory right created by Congress, § 925(b), provides that an indicted licensed dealer "may, notwithstanding any other provision of this chapter, continue operation pursuant to his existing license" if, prior to the expiration of the term of the existing license, "timely application is made for a new license . . . ."[8] Thus, the only condition that the *statute* explicitly places on the right to operate under an existing license is that a "timely" renewal application be made.[9]

The district court concluded, however, that the BATF, *by regulation*, could, and did, add another condition to the exercise of the right created by § 925(b), i.e., that the application must show whether the dealer was under

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8 The use of the phrase "notwithstanding any other provision of this chapter" makes clear that, even if there was another provision of the *statute* which prohibited an indicted dealer from continuing operation pursuant to his existing license, such a provision would have no applicability to an indicted dealer who filed a timely application. It follows that a regulation which was issued under the authority of 18 U.S.C. § 926 (which is a "provision of this chapter") would likewise have no applicability to an indicted dealer who filed a timely application. Indeed, it would be an absurd result if no provision of the *statute* could impose an additional condition on the applicability of the § 925(b) exception but that a provision of a regulation could impose such a condition.

9 It is not disputed that Karl David's license application was timely.

indictment. § 178.143.[10] Moreover, according to the district court, that regulation could, and did, make the § 925(b) exception inapplicable for failure to comply with that additional condition.[11]

Thus, despite a clear congressional determination that the social cost was not substantial if a dealer continued to operate while under indictment and that the duties of a federal official did not include removing such a dealer's license, the district court concluded that the agency correctly determined that the social cost of such continued operation was too high unless the dealer also informed the agency that he was under indictment and concluded that it was

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10 The plain language of § 178.143 makes evident that it does not condition qualification for the § 925(b) exception upon the filing of an application showing that the dealer was under indictment. § 178.143 merely states that a renewal application "shall show that the applicant is under indictment . . . ." It does not state that a license shall not be renewed if such a showing is not made. In numerous other provisions of the regulations, by contrast, when a dealer may not do a certain act, the regulation expressly so states. See, e.g., §§ 178.93, .98, .99, .100, and .102.

11 The district court's analysis also effectively allows the agency to create an offense where none exists in the statute. By limiting the applicability of the § 925(b) exception, § 178.143, in effect, expanded the scope of the § 922(n) prohibition. But an agency "cannot employ the statute to make [acts illegal] by agency action" which are not illegal by statute. Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284, 290, 74 S.Ct. 593, 597 (1954). See also Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936)("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . .").

appropriate for the agency to remove such a dealer's license.[12] This result expands qualified immunity beyond the limits established by this Court.

IV. THE RIGHT ESTABLISHED BY § 925(b) WAS CLEARLY ESTABLISHED AT THE TIME OF THE EXECUTION OF THE SEARCH WARRANT

At the time of the execution of the search warrant, § 925(b) had been part of the federal firearms laws since 1968. It had never been amended nor had it been the subject of any judicial opinions. It uses non-technical, common English language words. Its meaning was thus clear from its plain language. In short, the right of an indicted dealer to continue operation while under indictment was clearly established.

In holding that it was not "clearly established" that the applicability of the right created by § 925(b) is conditioned only upon the filing of a timely application, the district court noted that "as of May 1995, there was no reported judicial interpretation of Section 925(b) . . . ." App. 24a.

The absence of reported judicial opinions as a basis for holding that a right is not clearly established has been squarely rejected by this Court. See Anderson, at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously

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12 The district court's assertion that "it would produce an absurd result to construe the statute as authorizing untruthful applications," App. 23a, is baseless. No such construction results if the § 925(b) exception is conditioned solely on the filing of a timely application since § 924(a)(1)(A) still makes it a violation to make a false statement on an application.

been held unlawful."). Thus, the absence of reported judicial interpretations of § 925(b) adds nothing to Mosley's and Blanton's contention that the § 925(b) exception was not clearly established. In fact, in light of the plain language of § 925(b), the absence of reported judicial interpretations strongly supports the view that the law *was* clearly established.[13]

V. A REASONABLY WELL-TRAINED LAW ENFORCEMENT OFFICER WOULD HAVE KNOWN THAT THE RIGHT ESTABLISHED BY § 925(b) APPLIED TO KARL DAVID

In Harlow, supra, this Court held that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." 457 U.S. at 818-819. Thus, in the instant case, since there are no "extraordinary circumstances," Id., the fact that § 925(b) was plain on its face should end the inquiry.

Contrary to this rule, the district court opined that a reasonably well-trained law enforcement officer could rely on "the regulations . . . extant on May 5, 1994." App. 24a. As explained above, however, the existence of a regulation does not alter the qualified immunity analysis since it is the absence of clearly established *statutory* rights which gives rise to qualified immunity.

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13 In addition to the absence of judicial decisions, the district court also looked to a statement in a BATF publication, *Your Guide to Federal Firearms Regulation 1988-89*, June 1988, p. 83, in assessing whether the law was clearly established. App. 25a. This statement is not "law" in any sense, however, and cannot be considered in assessing whether the right was clearly established.

Moreover, as explained above, the last sentence of § 178.143 does not purport to limit the right established by § 925(b). Nor were there any judicial interpretations holding that the last sentence of § 178.143 limits the right established by § 925(b).

In holding that Mosley's actions were objectively reasonable,[14] the district court also noted that "Mosley acted pursuant to a search warrant issued by a federal magistrate judge . . . ." App. 25a. But this Court has recognized that acting pursuant to a warrant does not necessarily prove that an officer's actions were objectively reasonable.

In Malley v. Briggs, 475 U.S. 335 (1986)[15], this Court wrote:

> Petitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in Harlow and Leon. In Leon, we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U.S., at 922, n. 23. The analogous question in this case is whether a

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14 The district court correctly held that "[t]he availability of qualified immunity is determined against a standard of objective reasonableness." JA 134.

15 Malley is no where mentioned in the district court's opinion.

> reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. (footnote omitted) If such was the case, the officer's application for a warrant was not objectively reasonable . . . . It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment. (emphasis added).

475 U.S. at 345-6.

In a footnote, this Court went on to note:

> [T]he rule we adopt in no way "requires the police officer to assume a role even more skilled . . . than the magistrate." . . . It is a sound presumption that "the magistrate is more qualified than the police officer to make a probable cause determination," ibid., and it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant,

> i. e., his request is outside the range of the professional competence expected of an officer. (emphasis added).

475 U.S. at 346 n.9.

In the instant case, a BATF "officer of reasonable competence" would have been familiar with § 925(b), a part of the federal firearms laws which had been unchanged for over a quarter of a century. Thus, a BATF "officer of reasonable competence" "would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Mosley is not, therefore, entitled to qualified immunity because a magistrate judge issued the warrant based on an affidavit that should not have been requested.[16]

The district court also opined that a reasonably well-trained law enforcement officer "is entitled to rely on the views of an Assistant United States Attorney . . . ." App. 25a. This conclusion is inconsistent with the holding in Malley.

As discussed above, the fact of a search warrant does not necessarily prove that a law enforcement officer's actions were objectively reasonable. It follows that, if a law enforcement officer cannot hide behind a magistrate judge's issuance of search warrant, it is surely the case that a law enforcement officer cannot hide behind an Assistant United States Attorney who, unlike a magistrate judge, is as much a part of the executive branch as a BATF agent. Moreover,

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16 Because Blanton was a deputy U.S. Marshal and had been working exclusively for the BATF for a year, he is no more entitled to qualified immunity than Mosley.

an Assistant United States Attorney does not purport to occupy the neutral and detached role that a magistrate judge does since the role of the Assistant United States Attorney is to assist law enforcement officers in the prosecution of offenses.[17]

In sum, a reasonably well-trained law enforcement officer would have known that the § 925(b) exception applied to Karl David and, as a result, that there was no probable cause for the issuance of the search warrant.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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17 The district court also held that a law enforcement officer could "take into account the fact that Karl had been in fact indicted by a federal grand jury for violating Section 922(n)." App. 25a. This conclusion is inconsistent with the holding of Malley. Indeed, there is less reason to accord a law enforcement officer qualified immunity because of a grand jury's finding of probable cause than there is because of a finding of probable cause by a magistrate judge or an Assistant United States Attorney since, unlike a magistrate judge or an Assistant United States Attorney, a grand jury is composed of average citizens not trained in the law. In fact, the grand jury is even less familiar with the law than the BATF agents who testify before it. The fact of an indictment, therefore, should not provide qualified immunity to a law enforcement officer.

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*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 23, 1997

No. 96-1299
CA-95-346-3

KARL DAVID; JOHN DAVID
Plaintiffs - Appellants

v.

KENNETH G. MOSLEY, in his personal capacity; TAYLOR V. BLANTON, in his personal capacity

Defendants - Appellees

and

JOHN DOES, I-III, unknown special agents of the Bureau of Alcohol, Tobacco and Firearms, in their personal capacities; SCOT MOSER, in his personal capacity; B.J. CROPPER, in his personal capacity; CAROLINE COUNTY; SHERIFF OF CAROLINE COUNTY

Defendants

On Petition for Rehearing with Suggestions for Rehearing In Banc

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Appellants' petition for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1299

KARL DAVID; JOHN DAVID,

Plaintiffs - Appellants,

versus

KENNETH G. MOSLEY, in his personal capacity; TAYLOR V. BLANTON, in his personal capacity,

Defendants - Appellees,

and

JOHN DOES, I-III, unknown special agents of the Bureau of Alcohol, Tobacco and Firearms, in their personal capacities; SCOT MOSER, in his personal capacity; B.J. CROPPER, in his personal capacity; CAROLINE COUNTY; SHERIFF OF CAROLINE COUNTY,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District

Judge. (CA-95-346-3)

Argued: October 31, 1996 Decided: November 26, 1996

Before WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Karl David and John David appeal from the district court's entry of summary judgment against them on their Bivens* claim against Kenneth G. Mosley, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms (BATF), and their § 1983 claim against Taylor V. Blanton, a Virginia State Police Officer on assignment to BATF. Karl David was a federally licensed firearms dealer who ran his business out of the home he occupied with his son, John David. Based on information that Karl David (who was under indictment in Virginia for embezzlement) was receiving firearms shipments in violation of 18 U.S.C. § 922(n) and that Karl David and falsely denied on a BATF license renewal form, in violation of 18 U.S.C. § 924(a)(1)(A) that he was under indictment for a crime punishable by a prison

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* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

term exceeding one year, Agent Mosley obtained, and executed with the assistance of Officer Blanton, a search warrant for the home of Karl and John David. In their complaint the Davids claimed that the warrant was obtained and executed without probable cause and that the search exceeded the scope of the warrant. The district court rejected their claim, granting summary judgment to the officers. The Davids' appeal is now before us for decision.

After considering the join appendix, the briefs and the arguments of counsel, we affirm for the reasons stated in the district court's thorough opinion. See David v. Mosley, 915 F.Supp. 776 (E.D. Va. 1996).

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KARL DAVID, et al.,

Plaintiffs,

v. Civil Action No. 3:95cv346

KENNETH G. MOSLEY, et al.,

Defendants

MEMORANDUM OPINION

Karl David ("Karl"), a federally-licensed firearms dealer, and his son, John David ("John") initiated this action for monetary damages against Kenneth G. Mosley, Jr. ("Mosley"), a Special Agent employed by the Bureau of Alcohol Tobacco and Firearms ("BATF"), pursuant to Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), and against Taylor V. Blanton ("Blanton"), a Virginia State Police officer on special assignment to BATF, pursuant to 42 U.S.C. § 1983.[1] The Complaint alleges that the defendants violated the

[1] The Complaint also named Caroline County, the Caroline County Sheriff and a deputy as defendants. The plaintiffs voluntarily agreed to dismiss the action as to those defendants. At the same time, the plaintiffs abandoned their request to add the Sheriff's Office as a defendant.

constitutional rights of Karl and John to be secure against unreasonable searches and seizures.

STATEMENT OF FACTS

On October 6, 1993, Karl, who was then a federally licensed firearms dealer, was indicted by a Caroline County grand jury for embezzlement, a crime punishable by a term of imprisonment for up to 20 years.[2] On March 23, 1994, as required by 18 U.S.C. § 924, Karl submitted BATF Form 8, Renewal of Firearms License, to the BATF in an effort to renew his federal firearms license for Karl's Gun Shop in Milford, Virginia. One question on that form asked: "Are you presently under indictment or information in any court for a crime punishable by imprisonment for a term exceeding one year?" Notwithstanding the pending state court indictment on charges of embezzlement, Karl responded in the negative.

On April 19, 1994, Mosley received information that Karl was receiving guns in interstate commerce. Because Karl was under indictment for a felony, receipt of such weapons violated federal law. 18 U.S.C. § 922(n). Mosley decided to monitor Karl's actions and, in furtherance of that objective, Mosley instructed Blanton to have the United Parcel Service ("UPS") notify Mosley or Blanton when UPS received any packages for Karl's Gun Shop.

On April 21, 1994, Robert Martinson, the UPS Loss Prevention Supervisor in Richmond, informed Blanton that

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[2] Virginia Code § 18.2-111. Karl was acquitted of this charge on September 14, 1994.

UPS in Fredericksburg had received two packages destined for Karl's Gun Shop, one from a gun shop in Norfolk and another from a gun collector in North Carolina. Kenneth Tickle, manager of the Fredericksburg UPS office, decided to open the package from the Norfolk gun shop[3] and discovered a Smith and Wesson .38 caliber pistol. On April 24, 1994, Blanton went to the Fredericksburg UPS office to x-ray the package from North Carolina, but found that it had already been delivered to Karl's Gun Shop.

On April 26, 1994, Martinson reported to Mosley and Blanton that UPS had received two more packages for Karl's Gun Shop, one from a firearms dealer in Ohio and one from a firearms dealer in Iowa. Mosley and Blanton determined in a telephone conversation with the Ohio shop that the Ohio package contained a Russian Makarov 9x18 caliber pistol. From the Iowa firearms dealer, they learned that the Iowa package contained gunsmithing supplies and equipment.

Also, on April 26, 1994, Mosley obtained permission to make a "controlled delivery" to Karl's Gun Shop while posing as a UPS delivery driver. An Assistant United States Attorney, George Metcalf ("Metcalf"), authorized the use of electronic surveillance during the "controlled delivery." Mosley and Martinson then delivered the packages to Karl

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[3] The plaintiffs allege that Tickle acted pursuant to instructions from Blanton. Blanton states that he never instructed Tickle to open either package because he had alternative methods of determining their contents. The record contains no statement from Tickle. However, the plaintiffs have offered no refutation to Blanton's affidavit. Hence their unfounded, conclusory assertions to the contrary are defeated by Blanton's specific affidavit.

while Blanton monitored the communications from a remote location. Karl acknowledged receipt of the packages by signing a UPS form.

After Mosley informed Metcalf that the packages had been delivered, Metcalf presented the foregoing facts, including the receipt of the Makarov pistol, to a grand jury, which charged Karl with making a false statement in a firearms license renewal application in violation of 18 U.S.C. § 924(a)(1)(A), and for receipt of firearms in violation of 18 U.S.C. § 922(n). The indictment was returned on May 4, 1994.

Also, On May 4, 1994, Mosley applied for a search warrant on the basis that, in violation of 18 U.S.C. § 922(n), Karl was receiving guns while under indictment for a felony. Based upon Mosley's affidavit, United States Magistrate Judge David G. Lowe issued a warrant authorizing the search of Karl's Gun Shop. The warrant authorized seizure of documents, including firearms licenses, applications for licenses, firearms acquisition and disposition records, and other records denoting "the purchase, receipt, ordering, and shipment of firearms since October 6, 1993, and all firearms received and purchased since October 6, 1993."

On May 5, 1994, Mosley and Blanton, along with three other officers, executed the search warrant at Karl's Gun Shop. According to Blanton and Mosley, they attempted to seize only firearms purchased after the date of the state court indictment (October 6, 1993) or firearms which were not listed in the Acquisition and Disposition ("A&D") Book maintained at Karl's Gun Shop. However, notwithstanding a

four to six hour review of Karl's records, Blanton and Mosley were unable to match all the guns with A&D listings. According to Blanton and Mosley, Karl told them to "just take the guns." Mosley Aff. ¶ 7; Blanton Aff. ¶ 32. Karl, however, denies that he gave the officers permission to take the unidentified guns and, in fact, asserts that he told Blanton and Mosley that certain of the guns were purchased well before October 6, 1993. Karl David Aff. ¶ 8; John David Aff. ¶ 16.

Out of approximately 50 guns on the premises of Karl's Gun Shop on May 5, 1995, 26 were seized. During the search, Mosley located documentary proof that Karl had acquired 11 of the 26 seized weapons after the October 6, 1993 state indictment. In addition, because of the April 26, 1994 "controlled delivery," Mosley already was aware that Karl had acquired a twelfth weapon, the Russian Makarov, from Ohio for which no acquisition documents were located in the A&D records.

Review of the A&D records during the search failed to disclose documents reflecting the acquisition date of 14 other weapons. The failure of Karl's A&D records to disclose the information required by law for those "14 other weapons" even after a lengthy review of the records was, in Mosley's view, justification to seize the undocumented weapons pending further review of the records. Mosley also thought that Karl had consented to the removal of the weapons for that purpose. Subsequent review of the seized A&D records disclosed that 8 of these "14 other weapons" were, in fact, acquired by Karl after October 6, 1993. That review also disclosed that one of the "14 other weapons" had been

purchased before October 6, 1993; and, because it was outside the scope of the warrant, it was returned to Karl. The subsequent examination of the A&D records failed to confirm an acquisition date for 5 of the "14 other weapons."[4]

PROCEDURAL HISTORY

On May 5, 1994, Karl was arrested and charged with the crimes set forth in the May 4, 1994 indictment. Subsequently, a gun shop in Ohio notified Metcalf that, on several occasions between November 2, 1993 and April 22, 1994, it had received orders for firearms from Karl's Gun Shop. Consequently, six additional counts were added in a superseding indictment which was returned on June 20, 1994. The superseding indictment, like the original indictment, charged Karl with making a false statement in a firearms renewal application in violation of 18 U.S.C. § 924(a)(1)(A) and with receiving on four occasions a firearm shipped in interstate commerce by a person under indictment for a crime punishable by a term of imprisonment exceeding one year in violation of 18 U.S.C. § 922(n). In addition, Karl was charged with making a false statement to the United States in violation of 18 U.S.C. 1001.

On July 8, 1994, the court, on the motion of the United States, dismissed the four counts of receiving a firearm while under indictment. On July 27, 1994, the court

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[4] On June 19, 1995, the court dismissed the civil action of the United States seeking forfeiture of the 14 unrecorded firearms seized from Karl's Gun Shop because it was untimely filed. The United States appealed from the June 19 Order and the court stayed the matter pending appeal.

dismissed, also at the instance of the United States, the count alleging that Karl falsely represented that he was not under indictment when he applied for renewal of his federal firearm dealer's license. On July 29, 1994, Karl was tried and convicted of the remaining count, the making of a false statement to the United States in violation of 18 U.S.C. § 1001.

On May 4, 1995, Karl and John filed this seven count civil action alleging violation of their constitutional right to be secure against unreasonable searches and seizures. Apparently, John's only interest is that he resided in Karl's home which also housed Karl's Gun Shop at the time of the search.

Count I alleges that the search was based upon a warrant which had been issued without probable cause. The theory of Count I is that there was no probable cause to apply for, or support issuance of, a search warrant because 18 U.S.C. § 925(b) provides an exception to § 922(n) for licensed firearms dealers, such as Karl, to continue operation under an existing license if a timely renewal application is made, even if the application contains false information. This theory is also the linchpin of Counts II and IV. Thus, Count II asserts that the seizure of the 26 firearms from the Davids' home was in violation of the Fourth Amendment because the warrant had been issued without probable cause for the reasons stated in Count I. And, Count IV asserts that all documents seized incident to the search were taken in violation of Karl's Fourth Amendment rights because the warrant had been issued without probable cause for the reasons set forth in Counts I and II.

Counts III and V focus on acts allegedly exceeding the scope of the warrant. Count III claims that 6 of the 26 seized firearms had been received before October 6, 1993, and were thus outside the scope of the seizure authorized by the warrant.[5] Count V asserts that documents were seized relating to firearms transactions occurring before October 6, 1993, putting them outside the scope of the warrant.[6] Count VII asserts that Blanton violated Karl's Fourth Amendment rights by directing, under color of law, a UPS employee to open packages addressed to Karl's Gun Shop without legal authority to do so.

Mosley asserts that, as to Counts I, II, and IV, he enjoys qualified immunity and therefore is entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c). Mosley's motion for judgment on the pleadings relies, in part, on matters beyond the pleadings and hence must be considered as seeking summary judgment under Fed. R. Civ. P. 56. Mosley also seeks summary judgment on Counts III and V on the merits and because of qualifiedly immunity.

Blanton seeks summary judgment on the theory that he is entitled to qualified immunity for Counts I, II, III, IV, and V. Presumably pursuant to Fed. R. Civ. P. 12(b)(6), Blanton seeks dismissal of Count VII for failure to state a

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[5] Count III originally alleged that the seizure of 7 firearms exceeded the scope of the warrant. However, in the course of discovery, the plaintiffs determined that there were only 6 such firearms.

[6] Count VI originally asserted that Caroline County failed to train and supervise employees of the Sheriff's Department in the execution of federal warrants but that count has since been abandoned.

cognizable claim because the opening of a package by a UPS employee does not state a cause of action under § 1983, which requires state action. Because Blanton's motion respecting Count VII relies in part on matters beyond the pleadings, it too must be considered as seeking summary judgment under Fed. R. Civ. P. 56.

DISCUSSION

Although the motions of Mosley and Blanton overlap substantially, they are sufficiently different to warrant separate consideration. For the reasons which follow, the motions for summary judgment are granted.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The rules further provide:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment,

> if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

It is the responsibility of the party seeking summary judgment to inform the court of the basis for its motion, and to identify the parts of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 216 (4th Cir. 1987). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories and admissions on file.'" Celotex, 477 U.S. at 324. The moving party may also use affidavits to support its motion. In response, the non-moving party must go beyond the pleadings and, by citing its own affidavits or by citing "'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. Opposition to a properly documented summary judgment motion may not be based solely on the pleadings. Id.

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis added). It is the function of the district court not to weigh the evidence, but to

determine whether there is a genuine issue for trial, and "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249 (citations omitted). Hence, summary judgment is appropriate if the evidence is "merely colorable" or "not significantly probative." Id. at pp. 249-50 (citations omitted). The standard for summary judgment mirrors the standard for directed verdict (now judgment as a matter of law) under Rule 50(a), Fed. R. Civ. P., the principal difference being procedural. Id. at 251. And, "when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citations omitted). The non-moving party, however, "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." Anderson, 477 U.S. at 257. The district court also "must view the evidence presented through the prism of the substantive evidentiary burden." Id. at 254.

Furthermore, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. Summary judgment is appropriate only if, upon consideration of the record as a whole, a reasonable trier of fact could not find for the non-movant. Allstate Fin. Corp. v. Financorp, Inc., 934 F.2d 55, 58 (4th Cir. 1991). But, where a faithful examination of the record establishes the absence of a genuine issue of material fact, it is "the affirmative obligation of the trial judge to prevent 'factually unsupported claims and defenses' from proceeding to trial."

Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987); see also Guinness PLC v. Ward, 955 F.2d 875, 883 (4th Cir. 1992). With these principles in mind, the court will consider the motions filed by Mosley and Blanton.

A. Mosley's Claim of Qualified Immunity: Counts I, II And IV

Mosley seeks summary judgment on Counts I, II and IV, on the theory that he is entitled to qualified immunity.

The Supreme Court of the United States has determined that law enforcement officials are entitled to a qualified immunity from personal civil liability under 42 U.S.C. § 1983 in large measure because of the complex tasks performed by such officials. Taylor v. Farmer, 13 F.3d 117, 120 (4th Cir. 1993).[7] Thus, in Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818.

Applying that principle to determine whether an official is entitled to qualified immunity in a suit alleging Fourth Amendment violations, the Supreme Court, in

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[7] The claims against Mosley (and, in reality, those against Blanton) are against federal officials under Bivens v. Six Unknown Named Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), but the principles applicable in § 1983 actions also apply in Bivens actions.

Anderson v. Creighton, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), held that immunity from civil liability exists so long as the official's "actions could reasonably have been thought consistent with the rights they are alleged to have violated." Id. at 638. In that regard, the Court explained that:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

Thus, the doctrine of qualified immunity extends to law enforcement officers a margin of error "when they navigate uncharted areas at the margins of constitutional criminal law." Tarantino v. Baker, 825 F.2d 772, 774 (4th Cir. 1987).[8] This is because ". . . there are two levels on which the immunity shield operates. First, the particular right must be clearly established in the law. Second, the manner in which the right applies to the actions of the

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[8] The Supreme Court's decision in Horton v. California, 496 U.S. 128, 130, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990) abrogated Tarantino insofar as Tarantino limited the plain view doctrine to inadvertent discoveries. Horton does not, however, affect those parts of Tarantino's holding cited herein.

official must also be apparent." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992), cert. denied, 506 U.S. 1080, 113 S. Ct. 1048, 122 L. Ed. 2d 356 (1993). Therefore, "officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Id.

The availability of qualified immunity is determined against a standard of objective reasonableness. See Davis v. Scherer, 468 U.S. 183, 191, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984). As the Court of Appeals for the Fourth Circuit has observed, "[t]he Supreme Court's decisions place a special emphasis on the reasonableness of an officer's actions, requiring courts to make an objective inquiry into the facts facing the officer at the time of the alleged improper act." Taylor v. Farmer, 13 F.3d at 120. Consequently, whether an official may be held personally liable for unlawful official action turns on "the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. at 639; see also Price v. Sasser, 65 F.3d 342, 345 (4th Cir. 1995). And, the law "must be sufficiently clear that a reasonable officer would have known that his actions violated the law." Amato v. City of Richmond, 875 F. Supp. 1124, 1142 (E.D. Va. 1994) (emphasis in original).

Claims of qualified immunity are appropriate for resolution on summary judgment because immunity is an "entitlement not to stand trial or face other burdens of litigation." Turner v. Dammon, 848 F.2d 440, 443 (4th Cir. 1988). The Supreme Court has explained the task of a district court presented with a claim of qualified immunity on a motion for summary judgment as follows:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Harlow, 457 U.S. at 818-19. Viewed, then, in the proper context, the determination of a defense of qualified immunity involves three distinct steps:

> (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person in the officer's position would have known that doing what he did would violate that right.

Simmons v. Poe, 47 F.3d 1370, 1385 (4th Cir. 1995).

In this action, the specific right allegedly violated is said to be found in an exception to 18 U.S.C. § 922(n), a general prohibition against the interstate shipment or transport of

firearms by any person under indictment for a crime punishable by imprisonment for a term exceeding one year. The exception to this prohibition is found in 18 U.S.C. § 925(b) which provides that:

> [a] licensed . . . dealer . . . who is indicted for a crime punishable by imprisonment for a term exceeding one year, may . . . continue operation pursuant to his existing license (if prior to the expiration of the term of the existing license timely application is made for a new license) during the term of such indictment and until any conviction pursuant to the indictment becomes final.

18 U.S.C. § 925(b) (emphasis added). The plaintiffs assert that the clear language of the exception merely required that Karl file a renewal application (which he did) without regard to whether the questions in the application were completed truthfully (which they were not). Mosley argues that, accorded a common sense construction, the statute can only be interpreted to permit an exception if a truthful application is filed.

It is a fundamental rule of construction that statutes must be construed to avoid absurd results if that is at all possible. See e.g., Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir.), cert. denied, 128 L. Ed. 2d 192, 114 S. Ct. 1540 (1993); Brown v. Virginia Dept. of Corrections, 886 F. Supp. 531, 535 (E.D. Va. 1995). To this end, statutes applying to the same general conduct are to be read in paria matria. United States v. Morison, 844 F.2d 1057, 1064 (4th

Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 259, 102 L. Ed. 2d 247 (1988).

Section 922(n) is a clear statutory command prohibiting all persons under indictment for crimes carrying more than a year's imprisonment from shipping or transporting firearms in interstate commerce. Thus, the reach of Section 922(n) is quite extensive. Its broad purpose is to proscribe commerce in guns by those facing serious criminal punishment and its reach is correspondingly broad in an effort to protect the public. Excepted from this expansive proscription are licensed firearms dealers, persons who earn their living in whole or in part from commerce in firearms, if they have timely applied for a renewal of their license.

In a related section of the statute, 18 U.S.C. § 926, the Secretary of the Treasury is authorized to "prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter." In the exercise of this authority, the Secretary promulgated regulations which require an indicted firearms dealer to state in the renewal application that he is "under indictment for a crime punishable by imprisonment for a term exceeding one year." The regulation reads:

> Provided, That if the term of the license expires during the period between the date of the indictment and the date the conviction thereunder becomes final, such . . . dealer . . . must file a timely application for the renewal of his license in order to continue operations. Such application shall show that the applicant

> is under indictment for a crime punishable by imprisonment for a term exceeding 1 year.

27 C.F.R. § 178.143 (emphasis added).

Although Section 925(b) itself does not explicitly condition qualification for the exemption upon the filing of a truthful application, it is within the authority conferred on the Secretary by Section 926 to issue regulations prescribing the form and the content of the application which is required by Section 925(b)[9]. In addition, a logical common sense interpretation of the statute is that the dealer must somehow inform the licensing agency of the fact of the indictment and of the outcome of the proceedings. Otherwise, the licensing authority has no way of knowing that the narrow exception, rather than the broad rule, would apply. Moreover, it would produce an absurd result to construe the statute as authorizing untruthful applications.

For the foregoing reasons, the court concludes that Section 925(b), and the implementing regulations, cannot be interpreted to create in a licensed firearms dealer the right to operate under an existing license by filing a renewal application not in conformance with the Secretary's regulations which require, inter alia, disclosure of the fact of indictment. This, of course, means that the putative right allegedly violated by Mosley does not exist.

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[9] During the related criminal proceedings, the court expressed the view that the regulations appeared to be an impermissible expansion of the requirements of 18 U.S.C. § 925(b). Upon further reflection, it appears that view was in error.

Ordinarily, that would end the qualified immunity analysis. Moreover, it is preferable to articulate a single basis for decisions and thus refrain from making alternative holdings. Karsten v. Kaiser Found. Health Plan of the Middle Atl. States, 36 F.3d 8, 11 (4th Cir. 1994). However, because of observations made by the court in earlier, related proceedings, the parties have focused their arguments on the second and third prongs of the qualified immunity calculus: whether the claimed right was clearly established and whether a reasonable officer would have realized his actions would violate that right. Hence, it is best that the court consider the arguments on those points also.

As explained above, a reasonable reading of Section 925(b)'s language would permit law enforcement officers to conclude that a dealer must inform the Secretary of the fact of indictment in the application. Of course, as of May 1995, there was no reported judicial interpretation of Section 925(b) and hence, a reasonable reading of the statutory language would alone be sufficient to defeat the plaintiffs' assertion of the existence of a clearly established right to continue dealing in firearms after the submission of a false renewal application.

However, that was not the sole interpretive device available to a reasonably well-trained officer because the regulations were extant on May 5, 1994. As duly promulgated regulations, they are entitled to be considered by the law enforcement officer as imbued with the full force and effect of law. Chrysler Corp. v. Brown, 441 U.S. 281, 282, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979); United States v. Mitchell, 39 F.3d 465, 471 (4th Cir. 1994).

Also, in 1994, the 1988-89 BATF agent's guide explained that an individual could receive a license "if the applicant . . . has not willfully failed to disclose required material information or willfully made false statements in connection with his application." (Your Guide to) Federal Firearms Regulation 1988-89, June 1988, p. 83. This guide is appropriately considered in assessing whether there existed a clearly defined right to secure the exemption of Section 925(b) by way of an untruthful renewal application.

Moreover, a reasonably well-trained law enforcement officer is entitled to rely on the views of an Assistant United States Attorney who sought an indictment charging Karl with illegal receipt of firearms while under indictment for a felony and to take into account the fact that Karl had been in fact indicted by a federal grand jury for violating Section 922(n). Finally, Mosley acted pursuant to a search warrant issued by a federal magistrate judge after a successful demonstration of probable cause to search Karl's Gun Shop.[10]

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[10] A magistrate's finding of probable cause receives "great deference," Spinelli v. United States, 393 U.S. 410, 419, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), and an officer executing a warrant issued by a magistrate is entitled to rely upon the validity of that warrant except in limited instances of obvious irregularity. These include, for example, (1) where the magistrate wholly abandoned his judicial role; (2) where the warrant is based upon an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; (3) where the warrant is facially deficient in failing to particularize the place to be searched or the objects to be seized; or (4) where an officer submitted an affidavit that contained knowingly false statements and he should not have applied for the warrant. United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677 (1984); Amato v. City of Richmond, 875 F. Supp. at 1144-45. The Court finds that none of those exceptions are presented by this record.

Considering the absence of judicial decisions interpreting Section 925(b), the language of the statute itself, the regulations implementing the statute, the BATF publication, the views of the Assistant United States Attorney assigned to the investigation, the fact of the grand jury indictment for a violation of Section 922(n), and the action of the magistrate judge, it simply cannot be said that the right on which the plaintiffs fasten their claim was clearly established, even if the statute accorded them the right on which they fasten their claims (which, as explained above, it does not). And, it certainly would not be known by a reasonably well-trained officer that applying for or executing a search warrant in this case violated a clearly established right.

Counts I, II and IV all depend upon the theory that Section 925(b) created a clearly applicable exception to Section 922(n) and therefore that the search (Count I), the seizure of weapons (Count II) and the seizure of documents (Count IV) were without probable cause. The findings that: (i) there is no exception under Section 925(b) absent a properly completed application; and (ii) even if there was, any right created by that exception was not so clearly established as of May 5, 1994 that a reasonable officer in Mosley's position would have known that his actions violated that right, thus put to an end the claims asserted against Mosley under Counts I, II and IV. Mosley will be granted summary judgment as to those counts.

B. Blanton's Claims Of Qualified Immunity Under Counts I, II and IV

Blanton's Motion for Summary Judgment on Counts

I, II and IV are controlled by the same rationale which supports the disposition of Mosley's motion on those counts.

C. The Claims Against Mosley And Blanton: Counts III and V

Mosley and Blanton also seek summary judgment on Counts III and V.[11] In those counts, the plaintiffs allege that, notwithstanding the fact that the search warrant authorized only the seizure of firearms purchased after October 6, 1993 and documents relating to the receipt of firearms after that date, 6 of the 26 firearms seized were purchased before that date and several documents seized related to transactions occurring before that date.

1. Firearms

During the search, it was confirmed from Karl's own records and from Mosley's personal knowledge that 12 of the 26 guns seized had been acquired after October 6, 1993, the date of the state indictment which was pending when Karl filed the application for renewal of his license. Investigative efforts after the search revealed that 8 others were also acquired after that date. The plaintiffs assert that Mosley and Blanton improperly seized the remaining 6 guns because they lacked probable cause to believe that those unrecorded firearms had been acquired by Karl after October 6, 1993.

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[11] While Blanton's actual Motion for Summary Judgment purports only to seek summary judgment on Counts III and V on the basis of qualified immunity, the Memorandum in Support of his motion addresses these counts on the merits.

Probable cause in the seizure context means that "the facts available to the officer would 'warrant a man of reasonable caution in the belief,' [citation omitted] that certain items may be . . . useful as evidence of a crime . . . ." Texas v. Brown, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983). "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." Id.; see, also, United States v. Jones, 31 F.3d 1304, 1313 (4th Cir. 1994). Of course, the seizure must be within the scope authorized by the warrant, but that does not preclude the need to assess what evidence is, and is not, within that scope where, as here, the scope is defined by a purchase date and the seized item bears no facial indication of the date of purchase.

Applying this standard to the circumstances presented on May 5, 1994, it must be remembered that Karl was required to maintain acquisition records and that, using those records, he had helped Mosley and Blanton locate documentation for each of the other guns, but was unable to do so for the 6 firearms in question. This rightly struck Mosley as unusual given Karl's cooperation during the search and his ability to track down the acquisition dates of other guns. Indeed, it strongly suggested that the records would not provide proof of acquisition at all.

Moreover, Mosley "had personal knowledge that 8 of the weapons he located on the premises had been acquired by [Karl] as a firearms dealer subsequent to October 6, 1993, but that this information had not been recorded in his Acquisition & Disposition (A&D) books." Supplemental Declaration, at 3. In this context, Mosley had valid reasons

to believe that the 6 unrecorded weapons were also received after October 6 and were not listed in the A&D records. This is not, as Karl asserts, a "guilt by association" theory for firearms seizures. Rather, it is merely one factor that contributed to Mosley's assessment that there was probable cause to seize the weapons. Assessing these factors together, "a man of reasonable caution" could have determined that these weapons were evidence of a crime, namely receipt of firearms while under indictment for a felony.

In addition, Mosley concluded that there existed independent grounds for the seizure of the weapons, notwithstanding the search warrant, because Karl willfully had failed to comply with the recordkeeping requirements imposed upon firearms dealers by 18 U.S.C. § 922(m). That section makes it unlawful for a licensed firearms dealer "to fail to make appropriate entry in or to fail to properly maintain, any record which he is required to keep pursuant to section § 923 . . ." Failure to maintain such records subjects the weapons to seizure under 18 U.S.C. § 924(d)(1).

At the time of the search, Mosley knew the following facts indicating a willful recordkeeping violation: firearms licensees are provided information about the obligation to maintain A&D records; such information was found in Karl's possession; firearms dealers are instructed to keep proper records after recordkeeping violations are uncovered during inspections; Karl's Gun Shop had been the subject of two compliance inspections where violations were

discovered;[12] and Karl had been advised on March 8, 1995 of his obligation to keep proper records. In addition, while firearms acquired outside a dealer's capacity as a licensee need not be recorded, Mosley asserts that the location of firearms in Karl's home did not "provide[] any clues as to whether they had been acquired by Karl as a licensee or for personal use." Supplemental Declaration, at 4. The absence of a means to identify the firearms as personal, which would have rendered the guns unseizable, left Mosley unable to rule out the possibility that the guns were evidence of a crime, namely the willful failure of a dealer to record firearms.

Armed with such knowledge and finding no records respecting the guns in question, it was not unreasonable for Mosley to suspect willful recordkeeping violations in contravention of federal law. This provided an independent ground for seizure of the weapons. Texas v. Brown, 460 U.S. 730, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983).

Finally, the exigencies of a search permit law enforcement officers to seize articles, subject to later verification as to their status, when probable cause supports a belief that the items fall within the purview of a search warrant or are otherwise evidence of a crime. See e.g., United States v. Fawole, 785 F.2d 1141, 1144-46 (4th Cir. 1986) (seizure of items found within a briefcase in order to make an inventory at agent's office and later returned was not violation of Fourth Amendment). Such a procedure is

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[12] This is not probative of a pattern of lawbreaking, but rather of Karl's knowledge that failure to keep records was illegal.

permitted in order to reduce the intrusiveness of the search and the time required to conduct it. See, e.g., United States v. Schandl, 947 F.2d 462, 465-66 (11th Cir. 1991).

2. Documents

In Count V, the plaintiffs contest the seizure of "documents relating to the purchase, receipt, ordering, or shipment of firearms prior to October 6, 1993." Originally, the plaintiffs conceded that Mosley was entitled to qualified immunity with respect to Count V because he had seized only documents relating to firearms acquired after October 6, 1993 as required by the warrant. Plaintiffs' Opposition to Motion of Defendant Mosley for Summary Judgment, at 12 n.14.

However, the plaintiffs now challenge the seizure of certain additional items, which Mosley admitted to seizing in his deposition, specifically, a Report of Violations, copies of expired licenses, and three BATF-published firearms regulation books. However, none of these documents "relate to the purchase, receipt, ordering and shipment of firearms prior to October 6, 1993," which are the only documents which are contested by Count V of the Complaint. There has been no motion to amend the Complaint to contest the seizure of these items, and the record shows that they are not the subject of the Complaint as to which judgment is now sought.

Moreover, even if the plaintiffs were permitted to thus expand the Complaint, Mosley has raised independent justification for the seizure of each of the objectionable

items: (1) the Report of Violations was evidence of knowing and willful disregard of recordkeeping obligations; (2) the search warrant specifically authorized the seizure of "Federal firearms licenses;" (3) one BATF publication, the "Green Book," was seized as evidence that Karl's false statement that he was not under indictment for a crime punishable by imprisonment for a term exceeding one year had been made "knowingly" in violation of 18 U.S.C. § 924(a)(1)(A); and (4) two copies of a second BATF publication were seized because Karl's possession of them constituted evidence both that his firearms license renewal application was knowingly false and that his recordkeeping violations were knowing and willful. Accordingly, the seizure of these documents was lawful.

Hence, Mosley and Blanton are entitled to summary judgment on Counts III and V on the merits.

D. The Claim Against Blanton: Count VII

In Count VII, Karl alleges that Blanton violated his Fourth Amendment rights by directing a UPS employee to open a package addressed to Karl's Gun Shop without obtaining Karl's permission. Blanton maintains that he cannot be held liable for the behavior of a private citizen which he did not authorize. For purposes of deciding this issue, it will be assumed that Blanton was a state, rather than a federal employee. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege facts which show (1) a deprivation of a right, privilege, or immunity secured by the Constitution or federal law; and (2) that the deprivation was caused by a person while acting under color of state law. Flagg Bros. Inc.

v. Brooks, 436 U.S. 149, 155-57, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978); see also Davis v. Hudgins, 896 F. Supp. 561, 569 (E.D. Va. 1995).

The right allegedly deprived was the right to be secure against unlawful searches. However, there must also be state action for a deprivation of an individual's constitutional rights to occur, and state action can be found only when it can be said that the state is responsible for the specific conduct about which the plaintiff complains. Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982). The state is accountable for a private decision only when it has exercised coercive power or has provided such significant encouragement that the choice, by law, must be deemed to be that of the state. The state's mere acquiescence in private action does not in itself, convert private action to that of the state. Id. at 1004-05.

According to Blanton's affidavit, he did not compel the opening of the UPS package by a private citizen. In fact, he states there were other options available to him if he wanted to discover the contents of the packages. In reality, the plaintiffs' charge rests only on the contrary, but conclusory, allegations of the pleadings. When those conclusory allegations are measured against the facts that: (i) the plaintiffs have no way of knowing what Blanton told UPS; (ii) they have produced no evidence from UPS, whose representative they could have deposed; and (iii) Blanton denies making an instruction to open the packages, the record will not support this claim. There being no genuine issue of material fact respecting Count VII, Blanton is entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, the Motion of Mosley for Summary Judgment on Counts I, II, and IV on the basis of qualified immunity and on the merits with respect to Counts III and V is granted. The Motion of Blanton for Summary Judgment on Counts I, II, and IV on the basis of qualified immunity and on the merits with respect to Counts III, V and VII is granted.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

SIGNED this 16th day of February, 1996

/s/
Robert E. Payne
UNITED STATES DISTRICT JUDGE

Richmond, Virginia